that it is prevented from providing this hypothetical service. WW seems to complain that it is prevented from providing its hypothetical "universal service" because it intends to rely on support which, in turn, affects its price. However, lack of support and the resulting price have not prevented it from providing mobile cellular service.

In the 13 states that WW has apparently applied for ETC status, there are vast numbers of customers to be served in service areas where there is little or no universal service support to be obtained; *i.e.*, those areas not considered high cost or located in Bell or other large LEC study areas with low average cost. For example, for South Dakota alone, there are incumbent ETCs serving approximately 284,000 loops (*i.e.*, lines), or approximately 70 percent of the total of 406,000 loops in the state, that do not qualify for USF support.[84] WW has failed to explain why it has not initiated wireless service priced to include unlimited local usage at flat rates, in competition with wireline local exchange service carriers, in those areas where universal service support is not applicable or available. The failure to provide responses to such obviously relevant questions with respect to what "universal service offering" WW actually intends or is capable of providing justifies the SD PUC factual finding that WW lacked any clear, financial plan.[85]

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[83](...continued)
with which a carrier must comply in order to qualify for ETC designation and universal service support. It is the entirety of the list of these services and requirements that constitutes the concept of "universal service." Regardless, even if there were a distinct "universal service," WW is totally free to begin providing this service.

[84] *See* NECA USF Data. For Kansas, 1,341,048 ETC lines do not qualify for high-cost support (approximately 84 percent of the total); for Minnesota, 2,541,427 ETC lines do not qualify for high-cost support (approximately 88 percent of the total); and in Nebraska, 900,137 ETC lines do not qualify for high-cost support (approximately 90 percent of the total). *Id.*

[85] *SD PUC Decision* at para. 23 ("[WW] has not yet finalized what universal service offering it plans to offer to consumers."); para. 24 ("The [SD PUC] finds that [WW's] statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state."); and para. 25 ("[WW] charged Nevada Bell 37 cents a minute during the
(continued...)

Moreover, the argument of WW that it cannot determine and specify the price for its hypothetical "universal service" unless and until it knows what the universal service support will be is without merit and lacks full candor on WW's part.[86] First, WW can determine the price without universal service support. Second, the amount of universal service support that incumbents' receive is known.[87] If the support is based on what the incumbents receive, then WW knows the universal service support amounts. As the Commission is aware, Mr. DeJordy, spokesperson and witness for WW before the SD PUC, has been directly involved in the Commission's ongoing universal service examination through his participation as a Rural Task Force member. Therefore, WW should be capable of specifying relevant terms and conditions of its offering, including price, absent universal service support (and state commissions are justified

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[85](...continued)
day and 25 cents a minute at night for each minute that exceeded the flat monthly rate.") The Coalition expects that the response of WW will be that "if the price is not competitive, then it will be not be successful in obtaining customers." *See, e.g.*, WW Petition at 22-25 and n. 52. This response fails to observe that users buy wireless mobile service at a premium to wireline, non-mobile service. There is no direct price competition with wireline exchange service because the two services are different. Mobile users have already demonstrated continued demand for mobile services at prices considerably higher than wireline fixed services, even in very low cost areas. These arguments suggest that WW really seeks ETC status and support merely to subsidize its current premium priced service that its wireless, mobile users demand, detracting from the credibility of its promises.

[86] WW Petition at 22-23 and n. 50.

[87] WW will likely respond that pricing for conventional mobile cellular offerings should not be considered instructive with respect to its intended "universal service offering." If the universal service offering is to include a mobile offering, then there is no fundamental difference between traditional cellular service and a mobile "universal service offering." Regardless, the public knows the threshold, benchmark prices (in an already presumably competitive CMRS world) that wireless carriers charge for their usage-based cost services -- they are usage-based prices. WW should be capable of detailing any cost differences, if any, for purposes of explaining its financial plan and speculative claims. However, WW has not provided any reasonable explanation of how it can offer an extensive, flat-rated, unlimited local usage service when no wireless carrier today offers any such service for a nominal charge. Most wireless carriers flat-rate plans are limited to certain amounts of minutes.

in expecting WW to do so), and should also be capable of specifying the terms and conditions, including price, according to the current or some assumed application of the universal service rules. Instead, the lure of support dollars has taken a back seat to the necessary analysis and justification properly expected of potential ETCs.[88]

## V. ASSUMING *ARGUENDO* THAT "INTENT" AND "COMMITMENT" WERE SUFFICIENT, WW HAS NOT SATISFIED EVEN THESE CONDITIONS AS A FIRST STEP

While actual performance with respect to achievement of the intended universal service objectives and principles is the proper requirement for ETC status, WW has not satisfied even its inadequate "intent" and "commitment" conditions. The approach WW has taken in South Dakota and in other states provides no assurance that universal service objectives will be served. The actual implementation plans of WW are sketchy and speculative. On the factual record, the SD PUC was properly skeptical of what, if any, universal service objectives would be served by designating WW as an ETC.

WW asks the Commission to conclude that the only requirement that a carrier must satisfy to be designated as an ETC is a "showing" of "capability" and "commitment."[89] Of course, a future expectation of a "capability" is not a showing. If carriers were to be granted ETC status based on their stated intent of future capability, and if there is no penalty if they do not achieve their stated intention, then carriers would obviously claim to satisfy conditions if there is a potential reward for doing so. Carriers cannot be rewarded for self-serving, non-binding, speculative "commitments," and universal service would suffer if that were the policy.

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[88] Similarly, the lure of alternative technology cannot replace sound analysis of public interest considerations. *See Iridium's Downfall: The Marketing Took A Back Seat To Science*, Wall Street Journal, August 18, 1999.

[89] *See, e.g.*, WW Petition at 4.

Regardless, the lack of substantive development of WW's so-called wireless local loop application, the lack of terms and conditions under which the speculative service would be offered, the lack of any current availability of a representative "universal service offering," and the generally evasive manner in which WW has avoided critical and relevant questions[90] provide very substantial evidence to support the SD PUC finding that WW had not even satisfied the first step of its "capability and commitment" conditions.

Moreover, the lack of state authority over CMRS mobile services, and WW's unsettling claim that states cannot consider the affordability of a service offered by a CMRS provider, including fixed local exchange services,[91] justifies the conclusion of the SD PUC that speculative claims about terms and conditions are an insufficient basis for ETC designation. Finally, as discussed further below, serious doubts remain as to the ability of WW to assume ubiquitous carrier status as the current incumbent "carriers of last resort" are displaced. The SD PUC is justified in concluding that WW wants to put the "cart before the horse" in order to gain a windfall from universal service support by seeking ETC designation without any full or assured commitment to universal service objectives.

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[90] If carriers refuse to answer critical questions regarding terms and conditions of their intended universal service offerings, state commissions will rightfully question the applicants' credibility. WW claims that state commissions have no legitimate interest in reviewing what are critical issues directly related to ETC qualification matters and universal service objectives. The Commission should send a clear signal to WW that terms and conditions of universal service offerings are relevant and critical to any ETC consideration. For example, WW has not responded fully and creditably to the following questions: (1) Does WW seek support for fixed or mobile service customers? (2) If only for fixed, how does it intend to distinguish, in a non-arbitrary manner, its fixed customers from mobile customers? (3) How can WW reconcile its claims regarding the expected price for its "universal service offering" being comparable to incumbents' exchange service offerings when such a price expectation is not consistent with the price WW offers for its mobile services? (4) Does WW intend to offer to its mobile customers the same or similar price that it offers to its intended universal service customers? If not, why not?

[91] WW Initial Brief at 37.

## VI. PREEMPTION DOES NOT AFFECT STATES' RIGHTS AND RESPONSIBILITIES TO CONSIDER AND DECIDE THE PUBLIC INTEREST WITH RESPECT TO THE POTENTIAL IMPACT OF ETC DESIGNATIONS ON SERVICE IN RURAL TELEPHONE COMPANY AREAS

The SD PUC rejected the request of WW based on the evidence and testimony before it examined, considered, or addressed the public interest effects of potential ETC designations. However, were the SD PUC to consider the public interest effects, additional information and policy issues relevant to this consideration would emerge. To the extent the Commission were to find, *arguendo*, that an entry barrier violation were to require preemption, the narrow action necessary to correct the violation cannot affect states' rights and responsibilities provided under the Act to determine the public interest with respect to ETC designations, particularly with respect to the additional finding with respect to areas served by rural telephone companies.[92]

Regardless of whether WW or any other CMRS or wireline provider satisfies ETC designation criteria, Congress directed that state discretion be exercised in the form of determining an additional "public interest" criteria for areas served by rural LECs to guard against the potential application of a counter-productive high cost support plan. Clearly, Congress has allowed state commissions the opportunity (in fact, the state commission is required)[93] to balance the conflicting goals of promoting more competitors with maintenance of universal service in rural areas.

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[92] "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." 47 U.S.C. § 214(e)(2).

[93] 141 Cong. Rec. S7948, (January 8, 1995)(Statement of Sen. Dorgan): "Aside from that, the bill said that the States may require there be a designation; that the designation would be: First, in the public interest; second, encourage development of advanced telecommunications services, and third, protect public safety and welfare. . . . My universal service amendment very simply says that provision of law shall be changed from "may" to 'shall.' In other words, the States shall require that there be a demonstration of those three approaches."

There are additional risks of designating a second ETC for customers in areas served by rural LECs. The demographics of rural areas present very different considerations and potential public interest dangers. A fast-growing, higher volume market may be divided over time without overwhelming, detrimental effects on any set of customers. Market demand grows to accommodate market share shifts. On the other hand, the cost recovery and network effects on carriers and customers in lower volume, slower growth, or even stagnant or declining markets, may lead to hardship and counter-productive effects in the form of higher basic rates.[94] The LECs that serve more rural areas are also more vulnerable to the effects of the loss of only a few, or even one, of their higher volume customers.

For rural areas and customers, attempts to provide universal service funding to duplicate, competing networks may have the perverse effect of depriving either network of the necessary support, with the result that neither network will be able to stand ready to provide the desired level of advanced services to all at prices comparable to urban areas. Providing access to scarce support mechanisms to multiple providers could undermine the goals of universal service in areas that lack the demographic and service characteristics to support more than one network. As cost recovery risk is raised, a carrier required to serve as a last resort provider will find it more difficult to find new capital to commit to new equipment investments, ongoing plant upgrades, network evolution and advanced services, if its network cost recovery is diluted by carriers that do not stand ready to serve all.[95] The ultimate cost recovery climate imposed by policymakers will largely determine the network capital deployment decisions of carriers. A reliable, ubiquitous and

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[94] 141 Cong. Rec. S7948, (January 8, 1995)(Statement of Sen. Dorgan): "If they bring telephone needs to that town and take the business away from the existing service carrier, the rest of the services would be far too expensive and the whole system collapses."

[95] *Id.*: "We should make sure that we have a buildout of the infrastructure, so this information highway has on ramps and off ramps -- yes, even in rural counties of our country."

dynamic telecommunications network of broad geographic reach will be necessary to ensure that residents and businesses throughout rural areas obtain the benefits of universal and evolving telecommunications service.[96]

Congress recognized these greater potential dangers and counter-productive effects for rural customers presented by the possibility of more than one ETC in a rural LEC area and adopted a specific provision, beyond that which applies to non-rural LEC areas.[97] Accordingly, the Act contemplates that State Commissions will consider factors other than the basic ETC criteria.

Moreover, contrary to WW's rhetoric, the Act also contemplates that state commissions will consider factors other than the promotion of more competitors in determining the public interest. If the promotion of more competitors were the sole or supreme consideration, there would be no purpose in a separate public interest factor and all requesting carriers would be designated ETCs because each additional carrier is another competitor. Policymakers cannot avoid the possible conclusion that under current conditions, multiple ETC providers of service and universal service goals may never be mutually achievable in many high-cost rural areas.

Instead, universal service policy goals are separate from, and in addition to, the promotion of more competitors and competition. The success of any universal service plan, including the manner in which ETCs are utilized to fulfill the objectives, can only be judged by the results. A successful plan will require making available to all users quality and advancing services at

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[96] Designating a second ETC in rural areas could have one of two adverse effects. Either the total cost of the universal service support plan must increase (and society will support this additional cost) or neither ETC will receive the funding needed to provide and maintain a ubiquitous, state-of-the-art network in high cost areas that remains ready to serve all at comparable rates.

[97] *See* 47 U.S.C. § 214(e)(2).

reasonable, affordable, and comparable rates. Congress fully recognized that competition, by itself, will not produce the intended universal service results in lower volume, higher cost rural areas or for some less competitively desirable customers, and Congress adopted explicit universal service provisions to balance its competitive initiatives. This public interest requires adoption of appropriate regulatory approaches that do not strip the states of their rights and responsibilities to address the fundamental tension between these goals.

Therefore, preemption cannot be applied improperly and unlawfully to frustrate a state's ability to consider the public interest as provided for in the Act.

## VII. THE PUBLIC INTEREST CANNOT BE PROPERLY CONSIDERED BECAUSE THE POLICIES REMAIN UNRESOLVED WITH RESPECT TO UNIVERSAL SERVICE AND THE TREATMENT OF COMPETITIVE ETCs

If the SD PUC had accepted WW's contention that its showing of "commitment" was sufficient for ETC designation, it would have then been required to make a public interest determination as to the service areas of the rural telephone companies which serve 30 percent of the access lines in the State. If this Commission were to require reconsideration of WW's application, the PUC would be hard pressed to evaluate the public interest because the future of universal service is so unsettled and uncertain.

Several basic and crucial provisions of the universal service plan are the subject of reconsideration requests which remain unresolved.[98] The Federal-State Joint Board and the

[98] For example, the level of support under the federal plan in relation to the states remains unresolved. The interim provision which applies to the sale of lines from one carrier to another is unresolved. *See* Petition for Reconsideration and Clarification of the Rural Telephone Coalition, filed July 17, 1997, in CC Docket No. 96-45 at 7-8. The so-called portability rules require further consideration. *Id.* at 8-9. As the comments in this section explain, there are several mechanical aspects that are undefined or unworkable under the interim approach.

Commission are still examining the entire fundamental approach to the plan.[99] Fundamental decisions regarding the potential use of cost models intended to determine costs for universal service high cost support are not resolved. The lack of clarity in the rules is compounded with respect to CMRS providers and application with respect to mobile services.[100]

The current Interstate Universal Service Fund ("USF") mechanism nevertheless continues under the actual financial accounting cost approach that has been in effect for many years. There are many mechanical aspects of the initial rules which will require rethinking and modification. Finally, many of the USF rules (either under consideration or adopted as part of the current interim approach) do not, in their current form, properly achieve the universal service goals outlined in the 1996 Act.

### A. THE REGULATORY TREATMENT AND STATUS OF FIXED SERVICES OF CMRS PROVIDERS REMAINS UNSETTLED

The regulatory status and treatment of fixed wireless applications of CMRS providers remains the subject of an open FCC proceeding.[101] Although the Commission received comments

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[99] *See, e.g., Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket 96-262 and Further Notice of Proposed Rulemaking*, released May 28, 1999.

[100] In addition to the issues discussed in the text, additional problems arise with respect to defining specifically the potential types of CMRS services for which wireless carriers seek ETC status (*i.e.*, whether for fixed or mobile services) and defining the area associated with a mobile service user. The geographic area in which an ETC provides service is important because USF support is related to specific "support areas," with different areas receiving much different levels of support. "Mobile" services are obviously provided anywhere the mobile phone will work on the CMRS system, making a specification of a service location an extremely arbitrary consideration. The current competitive ETC, portability, and universal service rules either were not intended to apply, or the designers neglected to recognize that they may apply, in a mobile sense because no rational application is provided for in the rules. The potential use of "rate centers" or billing address methods would be arbitrary and would provide perverse incentives to seek universal service support for areas where support may not be warranted.

[101] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the

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in its *Fixed Wireless Proceeding* several years ago, no decision has been issued. In any event, the Commission has already rejected any contention that fixed wireless service providers must be regulated as CMRS providers just because fixed wireless services would be provided by CMRS providers in spectrum that has been allocated for CMRS.[102]

States cannot determine the public interest issues and impacts if they do not understand the regulatory status under which the provision of fixed or mobile services of CMRS providers may displace the provision of services by wireline providers. If CMRS providers are to provide services to the public that are potentially and substantially a replacement for traditional wireline ETC universal services (which is the result if CMRS providers are truly to act as ETCs), then the States need assurance that the terms and conditions under which ETC services may be provided by CMRS providers and the regulatory factors that will govern the provision of ETC services are fully resolved and understood. Under the current situation, States cannot know what regulatory tools may be available to ensure implementation of universal service objectives if the regulatory treatment of CMRS providers asking to be designated as ETCs is unknown.

### B. UNIVERSAL SERVICE PROVISIONS ARE INCOMPLETE

The Commission's interim rules addressing universal service high cost support, other forms of cost recovery (*i.e.*, the future of access cost recovery), and the application of LEC and

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[101](...continued)
Commercial Mobile Radio Services, 11 FCC Rcd 8965 (1996).

[102] *Id.* at 8987: "Some parties have also argued that because fixed wireless services would be provided by CMRS providers in spectrum that has been allocated for CMRS, the service providers must therefore be regulated as CMRS. We disagree. The regulatory structure for providers of the primary service to which the spectrum is allocated does not necessarily dictate the type of regulation to which every service provider in that same band will be subject regardless of the particular attributes of that service." WW also wants the Commission to preempt on the ground that the *SD PUC Decision* "impedes achievement of a competitively neutral support mechanism." WW Petition at 3-4. Of course, as a CMRS provider, WW already receives a substantial discriminatory advantage compared to LECs.

interconnection requirements are incomplete. In several respects, the interim rules: are counter-productive to the universal service principles and objectives outlined in the Act; cannot be applied rationally in their rough form; or are arbitrary in application.

The rules that prescribe support to "competitive ETCs" based on the incumbent ETC's support amounts (described as "portability") are counter-productive or unworkable in several ways. Section 54.307 of the Commission's Rules addresses portability, which reads in part:

> § 54.307 Support to a competitive eligible telecommunications carrier.
> (a) Calculation of support. A competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures an incumbent local exchange carrier's (ILEC) subscriber lines or serves new subscriber lines in the ILEC's service area.
> (1) A competitive eligible telecommunications carrier shall receive support for each line it serves based on the support the ILEC receives for each line.
> (2) The ILEC's per-line support shall be calculated by dividing the ILEC's universal service support by the number of loops served by that ILEC at its most recent annual loop count.
> (3) . . .
> (4) A competitive eligible telecommunications carrier that provides the supported services using neither unbundled network elements . . . nor wholesale service . . . will receive the full amount of universal service support previously provided to the ILEC for that customer. The amount of universal service support provided to such incumbent local exchange carrier shall be reduced by an amount equal to the amount provided to such competitive eligible telecommunications carrier.[103]

These rules apparently have not been applied to date. A letter from the Universal Service Administrative Co. ("USAC") to the Commission dated February 11, 1999, is attached to these Comments. This letter poses fundamental implementation questions regarding this unresolved interstate rule. One must conclude from this letter and the further comments provided herein that USAC is incapable of implementing the rules without reconsideration and/or clarification.

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[103] 47 C.F.R. §54.307 (emphasis added). A competitive ETC is further defined as a carrier that meets the definition of an ETC and does not meet the definition of an incumbent LEC. In the context of SD PUC proceeding, WW would be a competitive ETC if designated as an ETC. *See* 47 C.F.R. §54.5.

Without corrections to these deficiencies, states cannot determine the public interest and no beneficial result could ever arise with multiple ETC designation under such circumstances.

### 1. The "Capture" A Customer Distinction Is Arbitrary

The concept of "capturing a line" is unworkable. The example discussed in the USAC letter demonstrates how application of this concept is unworkable. Because the potential impact (under the interim rules) on carriers is significantly different depending on whether the competitive ETC is serving a "new" or "captured" customer, it is evident that incumbent and competitive ETCs, as well as USAC, will have differing contentions. Any attempt to distinguish "captured" and "new" lines would be impossible to apply.[104] The fragile distinction would lead to perverse incentives for the carriers involved.[105]

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[104] Consider the following example. A business user may be considering acquiring service from a competitive ETC. At the same time, this user decides to expand its operations which requires more telephone lines. Assume also that the incumbent ETC receives federal USF. The end user currently has ten business lines. The end user expects to need 15 lines in the next year. If the end user were to increase its service from 10 lines to 15 lines with the incumbent ETC, and then switch five of those lines to the competitive ETC, these five lines would presumably be "captured" and the incumbent ETC's USF would be decreased according to the flawed Section 54.307(a)(4) of the Rules. 47 C.F.R. §54.307(a)(4) However, if the end user decided to acquire the additional five lines initially from the competitive ETC without first taking service from the incumbent, then the incumbent would obviously contend that the five lines are new lines under that distinction. This could lead to some curious marketing plans to encourage customers in similar situations to take service from the incumbent first so that the competitive ETC can penalize the incumbent later. Also, what will be the treatment for customers that discontinue service from the incumbent ETC and then some time later take service from the competitive ETC? Is there to be a distinction between "captured" and "new" if the customer was no longer a customer of the incumbent ETC for one day? 30 days? 12 months? There are only arbitrary answers to these questions.

[105] Section 54.307(a)(2) of the portability rules states: "The ILEC's per-line support shall be calculated by dividing the ILEC's universal service support by the number of loops served by that ILEC at its most recent annual loop count." 47 C.F.R. § 54.307(a)(2). If this is to imply that the portable support is the same for all of the loops served by the ILEC, then this provision is also flawed. Averaging of support across low-cost and high-cost areas, but making support portable for only subset areas invites new entrants to exploit the averaging to the detriment of universal service objectives and the public interest.

The proper approach is to recognize that this distinction is without a purpose and eliminate it. The distinction between a "captured" line and "new" line is in the current interim rules only as a means to apply the "zero sum game" provision which calls for subtracting support for "captured" customers from the incumbent.[106]

The absence of workable and productive mechanics is another reason why States cannot rush to designate a second ETC (particularly in rural LEC areas where the policy risks are greater) before application of the rules, in practice, is resolved and better understood.

**2. The Commission Has Not Resolved The Usage Minimum For ETCs**

The Commission has stated that it will quantify the amount of "local usage that must be provided without additional charge to the consumer by carriers receiving universal service support for serving rural, insular, and high cost areas," otherwise, "there is the potential that the consumer would have to pay additional per-minute fees and would not receive the benefits universal service is designed to promote."[107] Although the Commission has previously stated that it will determine what the usage should be, it has not yet resolved that issue. WW has repeatedly argued in favor of no local usage requirement. Regardless of what usage requirement would serve the public interest, this issue has not been resolved, and state commissions have no way of evaluating the public interest effect that could result.

Some states have previously concluded that universal service and the public interest are served with a requirement, for at least the incumbent carriers, to offer and provide a flat-rate, unlimited calling service package. Accordingly, the quantification of "local usage" relevant to ETC designation could impact the existing state determined public interest. While WW has some

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[106] As discussed later in this section, the "zero-sum game" presumption should also be removed in which case the "captured" line distinction is unnecessary.

[107] *Universal Service Decision* at para. 67.

times stated an intention to offer a wireless service including a flat-rate unlimited local calling service, WW has consistently urged the Commission not to require minimum flat-rate usage as a condition for ETC designation. Therefore, WW and other CMRS providers will likely not include unlimited flat-rate usage in their "universal service offering" unless required to do so.[108] As a result, state commissions, in evaluating ETC requests and the public interest implications cannot, at this time, assume that all carriers will offer reasonably priced flat-rated services in furtherance of universal service principles and the public interest.

### C. THE RULES THAT WOULD PROVIDE SUPPORT TO COMPETITIVE ETCS BASED ON THE INCUMBENT'S SUPPORT (*i.e.*, "PORTABILITY") ARE FLAWED AND HARMFUL TO UNIVERSAL SERVICE

The public interest determinations which the SD PUC would be required to make if forced to consider WW's application further will also necessarily consider those aspects of the Commission's rules which are actually harmful to universal service. For example, the rules apparently presume that universal service support is a capped amount to be split ("portable") among ETCs.[109] The "zero-sum game" concept embodied in the rules is an ill-conceived

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[108] CMRS providers are unlikely voluntarily to offer reasonably priced, flat-rated, unlimited calling. It seems unlikely that an unlimited service is economically feasible for wireless network providers. Other than WW's limited showcase offerings in a few locations, CMRS providers do not offer unlimited wireless service for any charge. While some CMRS carriers have flat-rated service offerings, the service offerings are capped at various numbers of minutes. When the flat-rate charge is divided by the minutes allowed, the effective rate is usually no lower than $0.10 per minute under the very best pricing plans.

[109] The total amount of the USF available to support high cost recovery is limited by an increase of no more than the increase in number of loops from one year to the next. *See* 47 C.F.R. § 36.601(c). (The rules apparently do not address whether or how wireless "loops" are to be counted from one year to the next, and the rules also do not apparently explain whether or how non-ETCs or non-incumbents should submit loop information for this calculation.) Moreover, the rules also prescribe that when a competitive ETC captures a customer from an incumbent ETC, the amount of support received by the competitive ETC will be subtracted from the incumbent's receipts. *See* 47 C.F.R. § 54.307(a)(4). Therefore, the combined operation of these rules creates

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provision of the plan. If the total amount of high cost support is limited and support is diverted from the incumbent ETC, the results will be increasing local rates, higher risk of capital recovery for all carriers, and lower levels of service commitment and investment in rural, high cost areas. These problems are particularly acute for rural LECs whose entire service areas are often very high cost areas.

Network costs are not incurred on a per-line basis, but the portable cost recovery support is to be based on a per-line count.[110] The USF rules apparently presume that support will be disbursed (and be portable) to an ETC based on the number of lines a carrier serves in a specific high cost service area, which infers that the ETC's "costs" are incurred on a per-line basis. That inference is completely incorrect, particularly for an ETC that is expected to remain prepared to serve all customers.

In reality, the network costs of an incumbent wireline ETC are related to the costs of building and operating a ubiquitous network, not to the actual number of lines in service. Network costs to a carrier that must remain prepared to provide service to all potential customers involves analysis of life cycle engineering of plant designs and population projections to arrive at the network that will be required for an extended period of time. Network costs are therefore based on the cost of an entire network that may be needed to serve the total number of potential customers (both served and unserved) that the carrier projects will require service in the next

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[109](...continued)
a capped amount of dollars that is divided and re-divided among ETCs.

[110] Although wireless services have been deemed to be sufficient to satisfy single-party service ETC requirements, the Commission's rules do not specify how wireless "lines" are to be counted in a manner that is equivalent to wireline service. The potential use of telephone numbers, billing accounts, or counts of CPE as a surrogate for "lines" presents arbitrary issues that have not been addressed.

several years. As a result, a wireline ETC's costs are largely fixed for the life of its network.[111]

Unfortunately, the network costs of a such a carrier do not change appreciably when the market is divided. If another carrier competes and the market is split, the total network cost for the original carrier does not significantly change as long as it remains ready to provide service to all. As a result, the per- line approach to support is flawed because the total level of ubiquitous network costs remain the same for this carrier regardless of whether there is one, two, or several carriers.

Were a ubiquitous network provider to "lose" some of its customers to another ETC, its per-line network cost actually would increase because it will have only a small reduction in its costs. Yet under the apparent portability approach, not only will its service revenue decrease but its support will also decrease.[112] The original ubiquitous network ETC eventually must either increase its cost recovery by rasing rates to the public or obtain higher levels of high cost

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[111] The "zero-sum" defect also occurs in the high cost modeling approach that the Commission has under consideration for universal service support purposes. The number of network providers operating in a given area is an independent variable that affects the cost of networks that are required to provide universal service to all. As service provision is divided in a market, each carrier loses economy of scale. In very sparsely populated areas, the loss in economy of scale can be enormous if just one large customer is lost. However, the models do not apparently recognize this relevant variable. *See* Petition for Reconsideration and Clarification of the Rural Telephone Coalition, filed with the Commission on July 17, 1997, in CC Docket No. 96-45 at 12.

[112] The USAC letter attached to these Comments provides some illustration of the potential effects. The single example that USAC presents illustrates the existing confusion that USAC cites as well as other remaining problems. While the example posed by USAC is illustrative, it does not reflect the full extent to which these rules may be counter-productive. Under the apparent operation of the rules, whenever a competitive ETC "captures" a line or customer (the rules are unclear), the competitive ETC receives the same per-line support as the incumbent received previously. *See* 47 C.F.R. 54.307(a)(1). Section 54.307(a)(4) further states that the "amount of universal service support provided to such incumbent local exchange carrier shall be reduced by an amount equal to the amount provided to such competitive eligible telecommunications carrier." As USAC demonstrates in its example, a distorted and arbitrary result is obtained under the application of the rule. For the example cited by USAC, the competitive ETC receives a higher per-line support for its lines than does the original ETC.

support.[113] The operation of the rule will lead to insufficient high cost support, more high cost in total to recover, higher basic rates, lower investment commitment by all carriers (due to the increased risks of capital recovery), and counter-productive effects with respect to the principles that Congress envisioned by its universal service rules.

There is only one inescapable policy alternative. If more than one ETC network is to be supported, then the total amount of universal service funding required to support the second ETC while also providing continued adequate support for the original ubiquitous provider must increase. The "zero sum" approach incorrectly presumes that the amount of high cost recovery support in a high cost area that would be sufficient to achieve the same reasonable and comparable rates and quality ubiquitous network result will not have to rise as more than one carrier provides service. To the contrary, under potential multiple provider networks, universal service objectives require a larger support fund, or those objectives will suffer.

On the other hand, the public policy benefits of devoting limited resources to high cost support of a second carrier that may or may not be prepared to assume ubiquitous network responsibility are dubious. Congress was aware of these facts. As a result, for rural areas, Congress included in the Act explicit provisions which prevent the designation of more than one ETC where such designation is not in the public interest.

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[113] For example, the loss of 50% of the original ETC's customers will not lead to a proportionate decrease in its network costs, particularly if it must continue to stand ready to serve all customers in the area. If this carrier's revenues and USF support were reduced by 50%, substantial basic rate increases for its remaining customers would be inevitable. Such a result is in conflict with the goals of universal service support which are to maintain comparable, reasonable, and affordable basic rates.

## D. THE DISPARATE AND UNCERTAIN APPLICATION OF INTERCONNECTION AND LEC REQUIREMENTS TO CMRS PROVIDERS IS AN ADVERSE PUBLIC INTEREST CONSIDERATION

WW's ETC designation request to the SD PUC presents a further complication with results that are not readily discernible because of its status as a CMRS provider. For example, the question of whether and under what circumstances a CMRS provider should be regulated as a LEC and subject to connecting carrier and service requirements expected of all LECs also remains unresolved. For example, the current set of policies are incongruent in that they confer rights without obligations with respect to interconnection requirements for CMRS providers.[114] In its interconnection order, the Commission decided, for now, not to treat CMRS providers as local exchange carriers.[115] As such, until such time as the Commission decides otherwise, CMRS providers apparently will not be classified as LECs, and are not subject to the obligations of Section 251(b) of the Act.[116] However, CMRS providers are allowed to avail themselves of the

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[114] The claims of CMRS providers of a larger "local calling area" is partially semantics because there is no direct comparison between CMRS "local" services and LEC basic exchange services. First, even though CMRS customers have access to larger calling areas with their wireless services, in the overwhelming number of cases, users pay usage-based prices that are comparable to short-haul toll calls provided by LECs and interexchange carriers. The only difference is that CMRS providers are not subject to equal access and the LEC/interexchange carrier arrangement does not apply. While some CMRS providers provide flat rated services, these service offerings are limited to a certain number of minutes. Therefore, the flat rate service is really usage-based. Moreover, the interconnection rules give CMRS providers an unfounded competitive advantage by applying arbitrarily the "Major Trading Area" approach to the "local service area" for purposes of transport and termination. *See* 47 C.F.R. § 51.701(b)(1) and (2). This provision leads to conditions that are not competitively neutral. *See* Petition of the Local Exchange Carrier Coalition for Reconsideration and Clarification, filed on September 30, 1996, in CC Docket Nos. 96-98 and 95-185 at pp. 16-17 ("An Overly Broad Definition of Calling Areas for CMRS Providers Will Distort Competition and Result in Jurisdictional Shifts in Costs and Revenues").

[115] 11 FCC Rcd. 15499, 15995 (para. 1004).

[116] *Id.* at 15996 (para. 1005). These requirements include: (1) the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of telecommunications services; (2) the duty to provide number portability; (3) the duty to provide (continued...)

rights to interconnection and to operate as LECs without classification as, and equal requirements of, LECs. It should be noted that the Section 251(b) requirements apply to all exchange and exchange access providers, including all non-CMRS ETCs and including all non-ETC, non-CMRS new entrants, yet these requirements do not apply to CMRS providers regardless of whether they actually function as LECs.

A carrier seeking ETC designation can neither claim that it intends to fulfill all of the public interest objectives embodied in being an ETC nor can it expect that the public interest will be served in a competitive world if it is exempted from the basic requirements imposed on all other LEC ETCs. The public interest cannot be served by designating a carrier as an ETC for the purpose of fostering universal service objectives if that carrier does not have resale obligations, does not have to provide equal access to interexchange carriers and long distance choices to its end users, and does not have to participate in number portability (*i.e.*, customers that change local service providers will be forced to change their numbers). State commissions rightfully will consider these contrary conditions with respect to the public interest in evaluating whether carriers should be designated as ETCs.

### E. SUBSTITUTABILITY IS ALSO AN IMPORTANT PUBLIC INTEREST CONSIDERATION

State commissions must also evaluate the public interest with respect to any ability of any potential second ETC to serve all consumers as a substitute to the services of the first ETC. A designated ETC has the full obligation to provide all of the services supported by the plan

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[116](...continued)
dialing parity including equal access; (4) the duty to afford access to poles, ducts, conduits, and rights-of-way; and (5) the duty to establish arrangements for the transport and termination of traffic. *See* 47 U.S.C. § 251(b)(1)-(5).

throughout the entire service area.[117] Moreover, if a second ETC were to be designated, the original ETC no longer has an involuntary network facilities obligation to continue to provide last resort universal services to all.[118] Therefore, every ETC must be viewed as if it will be the only carrier in its designated service area to be responsible for facilities-based "carrier of last resort" services, particularly for the customers to which it provides universal services. Therefore, policy determination and the public interest considerations with respect to ETC designations must consider this factor.

If a second carrier is designated as an ETC, it would be foolish for the original ETC to maintain and upgrade network facilities to outlying, high-cost customers that are now served by the second ETC.[119] Policymakers must understand that carriers will not continue to build and maintain multiple facilities-based networks when only one provider expects to receive revenues and if only one provider expects to receive high cost network support. Therefore, once a second ETC deploys facilities service to an otherwise very high cost customer, that customer will have to face the reality that its "last resort" service is now dependent on the second ETC's facilities, whether adequate and capable, or not. Therefore, "substitutability" public interest issues arise long before total relinquishment of ETC status by the incumbent becomes an issue.

One ETC cannot be required to continue to expend capital or to incur expenses to be ready to serve all while the second ETC has no requirement (but is to be rewarded with ETC

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[117] *See* 47 U.S.C. 214(e)(1).

[118] *See* 47 U.S.C. § 214(3)(4). Section 214(e)(1)(A) of the Act also states that an ETC can "offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."

[119] This also illustrates why all ETCs must be required not to prohibit resale.

status and support). If the incomplete federal universal service plan is not resolved properly, the current rules bring into question whether any carrier can be required to expend capital or incur expenses to be ready to serve customers that have moved to a second ETC if the original carrier is not provided any viable means to recover its costs other than overcharging its remaining customers.

While WW overstates the actual decision of the SD PUC in exclaiming incorrectly that the SD PUC expects a carrier to provide ubiquitous service prior to ETC designation,[120] the ability of an ETC to act as the last resort facilities-based service provider is a critically important public interest issue which cannot be avoided.

## VIII. ASSUMING *ARGUENDO* THAT THE COMMISSION DETERMINES TO ACT AGAINST SOUTH DAKOTA, THEN PREEMPTION MUST BE TAILORED NARROWLY

Assuming, *arguendo,* that the Commission decides to preempt, Section 253(d) requires the Commission to determine whether there is any violation and, if so, to preempt "to the extent necessary to correct such violation or inconsistency."[121] In other words, any Commission action must be tailored narrowly Further, as noted previously, WW did not raise the issue of the applicability of Section 253 before the SD PUC and thus did not provide the SD PUC any opportunity to explain its intentions in that context or to articulate any conclusions regarding the applicability of Section 253(b). At a minimum, the SD PUC should have an opportunity to reconsider its decision in light of both Sections 253(a) and (b).

Any Commission action that would grant ETC status to WW would violate Section 253(d) because such an action would be far beyond "the extent necessary" and would strip the

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[120] *See, e.g.*, WW Petition at p. 17.

[121] 47 U.S.C. § 253(d), emphasis added.

South Dakota PUC of its right and responsibility to determine and ensure public interest universal service objectives. If the Commission finds the SD PUC has misinterpreted the law, it should so state and permit the SD PUC to readdress the issue consistent with the Commission's conclusion. To the extent the SD PUC makes findings of facts based on an evidentiary record that plainly is not erroneous, the Commission's authority under Section 253 does not extend to disregarding those conclusions or conducting a *de novo* investigation or ETC designation.

There are many other relevant public interest considerations which the SD PUC should review and evaluate, and it should not be denied the opportunity to review these issues. The Commission cannot "reverse" the *SD PUC Decision* because the public interest standard and the discretion afforded state commissions with respect to areas served by rural telephone companies remains unaddressed.

It would be inconsistent with the Act to preclude states from requiring compliance with reasonable conditions for designation and from considering public interest impacts relevant to ETC designation and the achievement of universal service objectives. Furthermore, the Fifth Circuit decided that states retain the right to impose additional requirements in deciding ETC designations and the public interest associated with the goals of universal service. States' application of otherwise reasonable and relevant ETC designation conditions that may go beyond the most minimal set of requirements (but may not favor some carriers such as WW) do not present "barriers to entry" to preempt under the Act.

## IX. CONCLUSION

For the reasons stated in this Opposition, the Commission should reject WW's preemption arguments and dismiss its Petition.

Respectfully submitted,

THE COALITION OF
RURAL TELEPHONE COMPANIES

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September 2, 1999

# ATTACHMENT

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February 11, 1999

Ms. Irene Flannery
Chief, Accounting Policy Division
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C., 20554

Re: Clarification of Section 54.307

Dear Ms. Flannery:

Several parties have questioned USAC regarding the operation of Section 54.307 of the Commission's rules. As a result of these inquiries, USAC's High Cost and Low Income Committee authorized the corporation to seek clarification of Section 54.307 as it relates to the calculation of Universal Service support for both the competitive eligible telecommunications carrier (CETC) and the incumbent local exchange carrier (ILEC) in situations where both carriers are eligible recipients of support.

Specifically, we seek clarification of the phrase "captures an incumbent local exchange carrier's (ILEC) subscriber lines" in the calculation of support for the CETC.[1] Does the term "capture" mean only instances where the subscriber abandoned the ILEC's service for the CETC, or does it include instances where the subscriber adds service from the CETC in addition to its ILEC service (e.g., a second wireline service or wireless service)?

Additionally, USAC seeks clarification of the Section 54.307(a)(4) calculation methodology. Section 54.307(a)(4) requires that the amount of universal service support provided to an ILEC be reduced by an amount equal to the amount provided to such CETC for the lines that it captures from the incumbent. Did the Commission intend for USAC to calculate a per line amount for the CETC as described in Section 54.307 (a)(2), multiply the resulting amount by the number of captured lines, and subtract that amount from the support originally calculated for the incumbent per Section 54.307 (a)(4)?

The current rules operate such that ILEC "A" and CETC "B" would report their respective number of

1 47 C.F.R. § 54.307(a).

working loops as of December 31 of the previous year[2] (this assumes ILEC "A" and CETC "B" are both eligible telecommunications carriers providing service in ILEC "A's" serving area).[3] If ILEC "A" reports 800 lines and has total high cost support of $8,000 per month, the resulting per line support amount is equal to $10 per line per month. CETC "B" for that same period reports 200 customer lines in the service area, 100 of which are new customers and 100 of which have been "captured" from ILEC "A." The amount of support for CETC "B," at $10 per line, would then be $2000.[4] USAC then deducts the support amount associated with CETC "B's" captured lines from ILEC "A's" support.[5] ILEC "A's" support amount is thus adjusted to $7,000 per month ($8,000 minus $1,000 support associated with CETC "B's" 100 captured lines). Thus the operation of the rules provide $8.75 per line in support for ILEC "A's" 800 lines and $10 per line of support for CETC "B's" 200 lines.

We appreciate the Commission's attention to clarifying whether the operation of this section of its rules is what was intended or whether some other outcome should result. Please contact us if there are any questions regarding our request or if there is anything further we can do for you.

Sincerely,

Robert Haga
Secretary & Treasurer

RH:cah:\

Enclosure

cc: Craig Brown
Lisa Zaina
Tom Power
Linda Kinney
Kyle Dixon
Kevin Martin
Paul Gallant

2 47 C.F.R. §§ 36.611(h), 54.307(b).
3 47 C.F.R. §§ 54.201-54.207.
4 47 C.F.R. § 54.307(a)(1).
5 47 C.F.R. § 54.307(a)(4).

## CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Opposition of the Coalition of Rural Telephone Companies", was served this 2nd day of September, 1999, by first class, U.S. Mail, postage prepaid to the following parties:

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